SUPREME COURT, U. S.
DEC 17 1966
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

NO. 876

FRANCES D. KROHN,
Petitioner,

vs.

RICHARDSON-MERRELL, INC.,
THE WILLIAM S. MERRELL COMPANY
DIVISION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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INDEX

Opinions Below	2
Jurisdiction	2
Question Presented	2
Constitutional Provisions Involved	3
Statement	3
Reasons for Granting Writ	6
Conclusion	8
Affidavit of Service	8
Acknowledgement	9

CITATIONS

Cases:

Clem v. Brown, (Ohio 1965) 207 N.E. 2d 398	7
Krohn v. Richardson-Merrell, Inc., (1966) ... Tenn. ..., 406 S.W. 2d 166	2, 6
Owen v. Illinois Banking Corporation, (W.D. Mich. 1966) ... F. Supp. ...	7
Rush v. Great American Insurance Co., (1964) 213 Tenn. 506, 376 S.W. 2d 454	5

INDEX TO APPENDIX

State Court Order Sustaining Demurrer	1a
Tennessee Supreme Court Opinion	2a
Tennessee Supreme Court Order	11a
Tennessee Supreme Court Order Denying Rehearing	12a
First Amended Declaration	13a
Supplement to First Amended Declaration	21a
Demurrer	24a
Assignments of Error	25a
Opinion (U.S.D.C., Michigan), Irene Owen v. Illinois Baking Corporation	25a

IN THE

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FRANCES D. KROHN,
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vs.

RICHARDSON-MERRELL, INC.,
THE WILLIAM S. MERRELL COMPANY
DIVISION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

Petitioner Frances D. Krohn prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Tennessee entered in the above entitled case on September 23, 1966, denying petitioner's petition to rehear and adhering to the original opinion rendered July 18, 1966.

OPINIONS BELOW

The trial Court did not render a written Opinion, but did enter a written Order, Appendix, *infra.*, p. 1a. The original Opinion of the Supreme Court of Tennessee and its Opinion on Petition to Rehear are published, ... Tenn. ..., 406 S.W. 2d 166 (1966), Appendix, *infra.*, p. 2a-11a; 12a.

JURISDICTION

The judgment of the Supreme Court of Tennessee was rendered on July 18, 1966, and was entered on its minutes of that date. A Petition to Rehear was seasonably filed and on September 23, 1966, was denied by the Supreme Court of Tennessee and judgment thereon was entered on its minutes of that date. *Krohn v. Richardson-Merrell, Inc.*, (1966) ... Tenn. ..., 406 S.W. 2d 166.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3). The Federal question was raised and decided adversely to Petitioner in the State Court proceedings. *Krohn v. Richardson-Merrell, Inc.*, (1966) ... Tenn. ..., 406 S.W. 2d 166.

QUESTION PRESENTED

Whether it is an invidious and unconstitutional discrimination against a female spouse under the equal protection of the laws clause of the Fourteenth Amendment to the Constitution of the United States for the decisional law of the State of Tennessee (absent any statute) to permit a suit by a husband for loss of his wife's consortium caused by the negligent and willful act of a defendant and

to deny such remedy to a wife for loss of her husband's consortium in a similar case.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are those of the Fourteenth Amendment to the Constitution of the United States which provide that no State shall deny to any person within its jurisdiction the equal protection of the laws, as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

The suit was brought in the trial court by petitioner who alleged as her cause of action that by the willful, tortious and negligent acts of the defendant causing bodily injuries to her husband she had lost his consortium, for which loss she sought damages.

The final form of plaintiff's statement of her case, and to which the demurrer was sustained, is contained in the First Amended Declaration, as amended, and Supplement to First Amended Declaration, which are included in the Appendix, *infra.*, pp. 13a, 21a.

The defendant filed a demurrer as follows:

"Comes now the defendant, through its attorneys, and demurs to the declaration heretofore filed in this cause upon the ground and there is no warrant in law for the maintenance of such action as the plaintiff seeks, because she could not maintain such a suit at common law and there is no statute in Tennessee permitting its maintenance.

"WHEREFORE, DEFENDANT PRAYS JUDGMENT UPON ITS DEMURRER." Appendix, *infra.*, p. 24a.

The Trial Judge sustained the demurrer, without written Opinion other than that stated in his Order sustaining the Demurrer as follows:

"This cause was heard on Motion of defendant to dispose of its Demurrer to the Declaration in this cause consisting of the First Amended Declaration and of Supplement To The First Amended Declaration, when, having heard the argument of counsel and upon due consideration the Court is of opinion and finds that a wife has no such cause of action in Tennessee and the Demurrer should be sustained." From Trial Court Order, Appendix, *infra.*, p. 1a.

Petitioner appealed to the Supreme Court of Tennessee and filed her "Assignments of Error, Brief and Argument," assigning the following errors:

"1. The Trial Court erred in sustaining the demurrer to the Declaration. TR. p. 31.

"2. The Trial Court erred in finding and ruling that there is no such cause of action in Tennessee *under these particular facts* and as a result in dismissing Appellant's suit. TR. p. 31." Appendix, *infra.*, p. 25a.

When the case now *sub judice* was presented to the Supreme Court of Tennessee that Court had already committed itself to the rule that a wife has no cause of action for loss of her husband's consortium through accidental injuries to her husband notwithstanding that the Court allows such a cause of action to a husband for loss of his wife's consortium. *Rush v. Great American Insurance Co.*, (1964) 213 Tenn. 506, 376 S.W. 2d 454.

However, in this case in which *certiorari* is now sought, the Supreme Court of Tennessee for the *first* time had before it for decision the questions whether the rule mentioned could stand when challenged by a wife, (1) alleging willful injuries to her husband and (2) contending that the rule resulted in a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Petitioner contended in the Supreme Court of Tennessee (1) that its prior pronouncement denying a wife a cause of action for loss of consortium through a defendant's *negligent* injury of her husband was not binding in this case where the plaintiff alleges *willful* injury of her husband and (2) that its prior decision adverse to a wife's cause of action for mere negligent injury of her husband should be re-examined and overruled and (3) that petitioner had been denied the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States, inasmuch as the Tennessee decisions recognize in the husband a right denied to the wife solely by reason of her sex.

The Supreme Court of Tennessee wrote two Opinions: In the first it (1) declined to distinguish a case of willful injury from one of accidental injury, (2) declined to reverse its prior ruling adverse to a wife's cause of action

and (3) held that there was no merit in the constitutional question raised by petitioner. To avoid any possiblity that this Opinion might be construed as failing to pass on the constitutional question petitioner filed a Petition for Rehearing (R. p. 106). The Court rendered a second Opinion making it clear (1) that petitioner has an adequate basis for presentation of the federal question to this reviewing court, and (2) that the court was holding that the State's decisional law in favor of a husband's cause of action but against a wife's similar cause of action was permissible "classification" rather than impermissible "discrimination."

The published report of the decision of the Supreme Court of Tennessee originally and on the petition for rehearing shows in the Statement and Syllabus that the Court held that the Fourteenth Amendment was not violated by a refusal to allow a wife recovery for loss of consortium, although a husband is allowed such recovery. *Krohn v. Richardson-Merrell, Inc., supra.*

The constitutional question was properly before the Supreme Court of Tennessee and was decided by it adversely to the petitioner who asserted and relied on the constitutional guaranty.

Petitioner submits that the result is an invidious discrimination which denies to her the equal protection of the laws guaranteed to her by the Fourteenth Amendment.

REASONS FOR GRANTING WRIT

1. This Court is the Court of last resort in defining the scope and application of the provisions of the Fourteenth Amendment in cases involving the rights of individuals to *equality* before the law.

2. A *conflict* exists in the decisions of the State and Federal Courts respecting the constitutional question here presented.

In *Clem v. Brown*, (Ohio 1965) 207 N.E. 2d 398, the State Court applied the equal protection of the laws clause of the Fourteenth Amendment of the Constitution of the United States and allowed a suit by a wife for loss of her husband's consortium, while observing that except for this clause the law of *Ohio* would not allow such a suit.

Similarly in *Owen v. Illinois Banking Corporation*, (W.D. Mich. 1966) ... F. Supp. ..., in a case involving *Indiana* law, the United States District Court denied a motion to set aside a verdict in favor of the plaintiff wife, holding that it would deny equal protection if the laws of a state should deny the right to sue for loss of consortium when applied to a wife but not a husband. The Court thought such a distinction or classification unreasonable, impermissible and a violation of the Fourteenth Amendment guarantee. As this Opinion has not yet been published, copy is in the Appendix, *infra.*, p. 25a.

On the other hand, the Supreme Court of *Tennessee*, in the case *sub judice*, holds that the distinction is a permissible "classification" rather than an impermissible "discrimination."

3. The decision of this Court on the question involved is of far-reaching present and future importance to the public interest and to the orderly disposition of a multitude of cases which will crowd court calendars, State and Federal, awaiting a decision of this Court on the question. The question is squarely raised and presented for decision by this Honorable Court of last resort so

that all the uncertainty, delay and needless expense, otherwise inevitable, can be avoided.

4. The decision of the Supreme Court of Tennessee is *erroneous* in that it deprives petitioner of her constitutional guaranty against invidious discrimination based solely on the fact that she is a woman rather than a man.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

LOWE WATKINS,
DAN E. McGUGIN,
603 Commerce Union Bank Bldg.,
Nashville, Tennessee,

Counsel for Petitioner.

WATKINS, McGUGIN & STEWART,
Of Counsel.

December 1966

AFFIDAVIT OF SERVICE

I, Dan E. McGugin, counsel for the Petitioner, being first duly sworn according to law, depose and say:

I have this day of December, 1966, served a true and exact copy of the foregoing petition for a writ of certiorari upon the Honorable John K. Maddin, Jr., of Gracey, Buck, Maddin & Cowan, 300 James Robertson Parkway, Nashville, Tennessee, 37201, Counsel for the

Respondent Merrell-Richardson, Inc., The William S. Merrell Division, by delivering the same to his office at the address first shown.

.....
DAN E. McGUGIN

Sworn to and subscribed before me
this day of December, 1966.

.....
Notary Public

My Commission Expires:

ACKNOWLEDGEMENT

I acknowledge receipt of a true and exact copy of the foregoing Petition this day of , 1966.

.....
John K. Maddin, Jr.
Counsel for Respondent
Richardson-Merrell, Inc.
The William S. Merrell Company
Division, Respondent

In The
SECOND CIRCUIT COURT OF
DAVIDSON COUNTY, TENNESSEE

FRANCES D. KROHN

vs.

RICHARDSON-MERRELL, INC.,
The WM. S. MERRELL COMPANY
DIVISION

NO. 72167

MINUTE
BOOK 96

PAGE 114

ORDER

This cause was heard on Motion of defendant to dispose of its Demurrer to the Declaration in this cause consisting of the First Amended Declaration and of Supplement To The First Amended Declaration, when, having heard the argument of counsel and upon due consideration the Court is of opinion and finds that a wife has no such cause of action in Tennessee and the Demurrer should be sustained.

It is therefore ORDERED AND ADJUDGED that the Demurrer of the defendant is sustained, and that plaintiff's suit be and is hereby dismissed at the cost of plaintiff for which let execution issue. To this action of the Court the plaintiff excepts and prays an Appeal in the nature of a Writ of Error to the Supreme Court sitting at Nashville, which Motion is granted, conditioned upon plaintiff making bond or taking the pauper's oath within thirty (30) days.

/s/ John L. Uhlian
JUDGE

APPROVED FOR ENTRY:

WATKINS, McGUGIN & STEWART

BY /s/ Dan E. McGugin
Attorneys for Plaintiff

/s/ John K. Maddin, Jr.
Attorneys for Defendant

* * *

TENNESSEE SUPREME COURT OPINION

[406 S.W. 2d 166]

[166] FRANCES D. KROHN, Appellant,

v.

RICHARDSON-MERRELL, INC., the WILLIAM S. MERRELL COMPANY DIVISION, Appellee.

Supreme Court of Tennessee.

July 18, 1966.

Rehearing Denied Sept. 23, 1966.

Action against drug company for loss of husband's consortium. The Circuit Court, Davidson County, John L. Ulian, J., rendered judgment for drug company and wife appealed. The Supreme Court, Creson, J., held that wife's allegations that drug company which allowed dangerous drug to remain on market, and continued to advertise and solicit its use, intentionally rendered husband impotent did not state cause of action for loss of consortium as intentional injury was directed, not at

wife or marital relationship, but at husband who consumed drug and failure to allow wife recovery, although same is allowed husband, is not discrimination based on sex but was no more than practical and logical classification.

Judgment affirmed.

1. Husband and Wife 209(4)

Wife cannot recover for loss of consortium by reason of injury to her husband regardless of whether injury was negligently or intentionally inflicted.

2. Husband and Wife 229(2)

Wife's allegations that drug company, which allowed dangerous drug to remain on market, and continued to advertise and solicit its use, intentionally rendered husband impotent did not state cause of action for loss of consortium as intentional injury was directed, not at wife or marital relationship, but at husband who consumed drug.

3. Courts 90(1)

Court would not overrule its previous decisions and allow wife to recover for loss of consortium as only Legislature should allow such recovery.

4. Constitutional Law 249

Refusal to allow wife recovery for loss of consortium, although husband is allowed recovery for injury does not deny equal protection. U.S.C.A. Const. Amend. 14.

Dan E. McGugin, Nashville, for appellant.

John K. Maddin, Jr., Nashville, Gracey, Buck, Maddin & Cowan, Nashville, of counsel, for appellee.

OPINION

CRESON, Justice.

This appeal comes from the Circuit Court of Davidson County, Tennessee. The parties will be referred to herein as they appeared in the trial court; that is, appellant Frances D. Krohn as plaintiff, and appellee Richardson-Merrell, Inc., The William S. Merrell Company Division as defendant.

On June 17, 1965, plaintiff filed her declaration seeking to recover $250,000.00 in damages for loss sustained by her as a result of her husband, Howard E. Krohn,

[167] having taken a drug described as Triparanol, commonly referred to under the trade name of MER/29, the same having allegedly rendered him impotent. The declaration, as amended, contains six counts, but it is unnecessary to detail the contentions made in each of these counts as the question presented by the declaration as a whole is simply—may a wife recover for loss of consortium where the injuries resulting in the impotency of her husband were intentionally inflicted by the defendant. The declaration, as amended, charges that the defendant in this case, by allowing the drug in question to remain on the market, and by continuing to advertise and solicit its use, after knowing that the drug produced harmful side effects of the nature involved here, did intentionally inflict upon the plaintiff's husband the injuries sustained by him and resulting in the loss to the plaintiff for which recovery is sought in

this lawsuit.

On September 24, 1965, the defendant filed a demurrer to plaintiff's declaration, which reads as follows:

> "Comes now the defendant, through its attorneys, and demurs to the declaration heretofore filed in this cause upon the ground that there is no warrant in law for the maintenance of such action as the plaintiff seeks, because she could not maintain such a suit at common law and there is no statute in Tennessee permitting its maintenance."

On November 4, 1965, the trial court entered an order sustaining the defendant's demurrer upon the basis that "a wife has no such cause of action in Tennessee."

Appeal has been timely perfected to this Court from the action of the trial court in sustaining the defendant's demurrer.

The assignments of error filed in this Court are as follows:

> "1. The Trial Court erred in sustaining the demurrer to the Declaration. Tr. p. 31.
>
> "2. The Trial Court erred in finding and ruling that there is no such cause of action in Tennessee *under these particular facts* and as result in dismissing Appellant's suit. Tr. p. 31."

In support of these assignments of error, the plaintiff, after admitting that it is presently the established law in Tennessee that a wife may not recover for loss of consortium where the injury inflicted upon the husband is the result of negligence of the defendant, urges (1) that this case must be differentiated since it is alleged in

the declaration, and must be accepted as fact here, that the injury inflicted upon the husband, resulting in the loss to the wife for which compensation is sought here, was intentionally inflicted; and (2) that the Court, in keeping with a modern trend in this direction, should overrule its prior holdings.

[1] In a recent opinion of this Court it was exhaustively settled that under the common law a wife had no cause of action for loss of consortium; and that, since this decisional law has not been changed by statute, the law of Tennessee remains that there can be no recovery by a wife for loss of consortium by reason of injury to her husband. See Rush v. Great American Insurance Co. (1964) 213 Tenn. 506, 376 S.W. 2d 454. It is our intention to fully adhere to the doctrine of that decision. It is true that decision dealt with the subject of negligent injury to the husband, rather than with intentional injury. It is to be noted, however, that one of the cases cited in the opinion was that of Smith v. United Construction Workers, District 50 (1960) 271 Ala. 42, 122 So. 2d 153. In that case, the wife sued for loss of consortium of her husband, whose injuries, resulting in the alleged loss to the wife, were sustained as a result of an assault and battery committed upon him by the defendants. That Court denied recovery, though the injury inflicted upon the husband was plainly the result of an intentional tort, just as is alleged in the declaration in the case now before this Court. As stated, we adhere to all the views expressed in Rush v. Great American Insurance Co., supra, and in light of this, nothing is to be gained by again re-examining the points there decided.

[168] As said, the plaintiff lays great stress upon the fact that the present declaration alleges in-

tentional wrong. The fact remains that this is a cause of action for damages for loss of consortium; and it is our view that the suggested distinction is one without a difference. It is not a predicate for liability which the plaintiff here lacks; it is want of a cause of action under Tennessee law for the damages which she seeks to recover.

[2] The plaintiff in this case seeks to analogize this case to those cases where a wife is allowed to recover damages for losses resulting from an alienation of affection or criminal conversation. We think the appropriate distinction between these cases and the case at bar is illustrated by the following quotation from 24 A.L.R. 2d 1378, at page 1382:

"II. Loss resulting from intentional or wilful acts of defendant.

Sec. 3. Right of action recognized; generally.

Most of the cases involving intentional acts of the defendant directed against the marital interests of the wife, are for alienation of affections or criminal conversation which are not covered in this annotation. There have been some instances, however, where the courts have recognized a right of action in the wife for slanderous statements made to the husband about her, and for injuries intentionally inflicted upon the husband, although it is generally held that the malicious intent must be directed against her or the marital relationship itself, rather than against her husband."

To quote further from the above annotation:

"In most of the cases in which the wife's claim has

been based on the assertion that the injuries resulting in the loss to her of her husband's consortium were intentionally and maliciously inflicted upon him recovery has been denied." 24 A.L.R. 2d at 1385.

Obviously the foregoing does not support a recovery in this case, where the intentional injury is directed, not at the wife or the marital relationship, but at the consumer of the drug; in this case, the husband.

[3] As to the second contention of the plaintiff, that this Court should overrule its previous decisions and allow the wife to recover for loss of consortium, we cannot agree: We stand by the proposition so ably stated in Ruth v. Great American Insurance Co., supra, that this argument is rightly directed to the Legislature. We hold with the reasons stated in that opinion for this conclusion.

[4] Argument is made that the equal protection clause of the Fourteenth Amendment to the Constitution of the United States requires this Court to allow the wife recovery for loss of consortium, since the same is allowed a husband. To fail to do so, it is said, is to discriminate on the basis of sex; and that such is not a proper or legal basis for discrimination. In the first place, we do not find this question to be properly and timely made by the assignments of error in this case. Cf. Whitehurst v. Howell (1936) 20 Tenn. App. 314, 98 S.W. 2d 1071; Taylor v. Elgin (1918) 140 Tenn. 602, 205 S.W. 428. The idea here seems to have originated with a case from the United States District Court for the Western District of Michigan under the style of Owen v. Illinois Baking Corp., 235 F. Supp. 257. A second case of Clem v. Brown (Ohio Com. Pl. 1965) 207 N.E. 2d 398, is cited. We are in complete disagreement with

both the reasoning and result in those cases.

Assuming, but not deciding, that the Fourteenth Amendment to the United States Constitution would ever rightly come into play in a case such as that presented by this record, it is our view that many and obvious differences between what, by legal logic is re-
[169] coverable by the male spouse for injury, on the one hand, and the female spouse on the other, may be conceived of. In short, under this view, the Tennessee rules with respect to recovery for loss of consortium does not work a "discrimination" but no more than a practical and logical classification.

What we hold here is that the opinion in Rush v. Great American Insurance Co., supra, states the existing law of Tennessee; and, that under that law the plaintiff wife cannot maintain an action for loss of consortium by reason of injury to her husband, either on the basis of negligence or intentional act.

The judgment of the trial court, sustaining the demurrer of the defendant, is affirmed, with costs of this appeal assessed against the plaintiff below, appellant here.

BURNETT, C. J., and WHITE, DYER and CHATTIN, JJ., concur.

OPINION ON PETITION TO REHEAR

CRESON, Justice.

We have been presented with a petition to rehear. The essence of this petition seems to be that some phraseology contained in the Court's original opinion in this case has the effect of impeding or imperiling the appellant's further review of the question made with respect

to "discrimination" in violation of the Fourteenth Amendment to the United States Constitution.

We have, at some length, re-examined the original opinion, the petition to rehear and the reply thereto. On so doing, we think that the original opinion is entirely adequate as a basis for appellant's presentation of her contention to any other court. What we said in the original opinion, and say again, is that if the Fourteenth Amendment to the United States Constitution rightly comes into play in the situation presented in this case, then there is a permissible "classification," rather than an impermissible "discrimination." We are content to abide the Court's original opinion.

Petition to rehear is denied.

BURNETT, C.J., and WHITE, DYER and CHATTIN, JJ., concur.

Tennessee Supreme Court Order

SUPREME COURT, NASHVILLE

FRANCES D. KROHN

Vs.

RICHARDSON-MERRELL, INC.
THE WILLIAM S. MERRELL
COMPANY DIVISION

} Davidson Law
Affirmed

This cause coming on to be heard upon a transcript of the record from the Circuit Court of Davidson County, assignments of error, reply brief and argument of counsel, upon consideration whereof the Court is of opinion that in the judgment of the Court below there is no error.

It is therefore ordered and adjudged by the Court that the judgment of the Court below be in all things affirmed and that the demurrer be sustained and the case dismissed.

The costs of the Court below and the cost of the appeal will be paid by Frances D. Krohn, Principal, and Globe Indemnity Insurance Company, Surety. 7/18/66.

Tennessee Supreme Court Order Denying Rehearing

SUPREME COURT, NASHVILLE

FRANCES D. KROHN

VS.

RICHARDSON-MERRELL, INC., THE WILLIAM S. MERRELL COMPANY DIVISION

Davidson Law

Petition to Rehear Denied.

This cause coming on further to be heard on a petition to rehear and reply thereto, upon consideration of all of which and the Court finding no merit in the petition, it is denied at the cost of petitioner. 9/23/66

OFFICE OF THE CLERK FOR THE MIDDLE DIVISION OF THE STATE OF TENNESSEE.

[fol. 1]

TO THE JUDGES OF THE CIRCUIT COURT
OF DAVIDSON COUNTY, TENNESSEE

FRANCES D. KROHN

VS.

RICHARDSON-MERRELL, INC.
The WM. S. MERRELL COMPANY
DIVISION
a Delaware Corporation domesticated in Tennessee

NO. 72167

FIRST AMENDED DECLARATION

FIRST COUNT

With leave of the Court, plaintiff files this First Amended Declaration and sues defendant for $250,000.00 compensatory damages and for cause of action avers:

Plaintiff is an adult resident of Davidson County, Tennessee. Defendant is a corporation engaged in the manufacture and sale of drugs and medicines intended for human consumption.

On July 15, 1960, when her husband, Howard E. Krohn was 39 years old, he was suffering from elevated serum cholesterol, and on or about that date their family physician prescribed for him a drug named Triparanol, commonly referred to under the trade name of MER/29. This drug was developed, manufactured, advertised and sold by defendant which represented it to be a safe and

efficient drug for use by humans in cases of elevated serum cholesterol.

Her husband took MER/29 in the prescribed dosages as recommended by the defendant. Over a period of six months his cholesterol gradually reduced but [fol. 2] early in 1961 various unusual conditions and symptoms began to appear which she avers were adverse effects of his taking the drug MER/29. There was a gradual reduction in his libido and potency. His skin began itching. His hair suddenly began turning gray and falling out at an abnormal rate. He began having trouble with his eyes and vision which was growing worse and was the early stages of the formation of cataracts.

On March 20, 1961, on the advice of his physician he stopped taking MER/29. During the next several months the itching of his skin stopped, his hair stopped turning gray and falling out at the abnormal rate, his eye difficulty gradually cleared up, and his potency and libido began returning gradually. However, his potency and libido continued to increase beyond normal for a man his age and in the latter part of May and first part of June he and plaintiff were amazed to find him with the potency and libido he had had as a young man. This excessive increase continued increasing until June 20, 1961, on which date he sustained a priapism, that is to say, an erection which would not subside and which became extremely painful.

Their family physician promptly hospitalized plaintiff's husband in St. Thomas Hospital in Nashville and called a urologist into consultation in the case. During the next 17 days, that is, from June 20, 1961 until July 7, 1961, despite the most skillful treatment, her husband's

pain was so excruciating that the constant administration of morphine had very little effect, and his pain was so extreme and agonizing, it was necessary for him to be strapped to his bed in the hospital and at times it was necessary for the nurses to hold his mouth open to prevent him from chewing up his tongue in his [fol. 3] agony. This excruciating and agonizing pain rapidly brought on a bleeding gastro-intestinal ulcer, a condition from which plaintiff's husband had never suffered before, and from which he later recovered and has not suffered since.

About July 7, 1961 the priapism and agonizing and excruciating pain accompanying it, began to subside gradually but it was several months before they had disappeared. The massive doses of morphine administered to plaintiff's husband had caused him to become addicted to morphine and he suffered the tortures of withdrawal from the drug when its use was discontinued by the doctors. However those tortures were almost as nothing compared with the pain from his priapism between June 20 and July 7, 1961.

When her husband's priapism finally subsided he was left with a completely flaccid penis, which has remained flaccid ever since. Though her husband still has his libido or sexual desire, he is completely impotent and unable to perform the sexual act in the slightest. This has caused great physical and mental suffering to plaintiff and psychological difficulties affecting both her and her husband. Plaintiff is a normal, healthy woman who was then only 36 years of age, and she was and is in all respects a normal young woman for her years with normal emotional and sexual responses and needs. She avers that she had the expectancy of many years normal

consortium with her husband which has now been completely destroyed as she and her husband are advised by his physicians and she believes and avers that her husband's condition is permanent and that he will never again in the remainder of his life be able to
[fol. 4] perform the sex act.

Plaintiff avers that her husband's above described abnormal conditions and disorders culminating is his priapism and his complete impotency since July 7, 1961 are the direct and proximate result of his taking of the drug MER/29. Plaintiff avers that defendant was guilty of negligence in the development, advertising, warranty and sale of said drug in the following particulars, each and all of which proximately caused or contributed to the injury to and damage of plaintiff's husband:

(1) Defendant did not sufficiently and efficiently test this drug before putting it on the market for use by human beings.

(2) Defendant deliberately suppressed, withheld and misrepresented the adverse effects of this drug on test animals, including adverse sexual effects and abnormalities shown by the animals on which the drug was tested.

(3) Defendant wilfully withheld and misrepresented the foregoing information from and to the Food and Drug Administration with the result that the use of MER/29 was approved and licensed, the acts of defendant in this connection being a fraud in fact and a fraud in law.

[fol. 5] (4) Defendant by advertisements, by written brochures, by oral statements, by articles promoted by defendant and otherwise falsely repre-

sented to the Medical Profession, to pharmacists and to the general public that the drug MER/29 was a safe and efficient drug for the reduction of cholesterol in the blood and was free of harmful side effects, when in truth and in fact the said drug was unfit for and dangerous to humans and caused many harmful adverse effects, including those mentioned above which defendant knew or should have known. These false representations were relied upon by the doctors for plaintiff's husband and by her husband, to plaintiff's damage.

(5) Defendant failed to exercise reasonable and ordinary care in preparation, manufacture and distribution of this drug, and failed to give warning of its dangers.

(6) The defendant negligently failed to withdraw MER/29 from the market until an unreasonable period of time had passed after the defendants knew or should have known of its dangerous characteristics.

Plaintiff sues for her physical and mental pain and anguish and suffering and for the loss of consortium of her husband for the remainder of their natural lives.

Wherefore plaintiff sues defendant for $250,000.00 damages and demands a Jury to try her cause.

[fol. 6] SECOND COUNT

Plaintiff adopts each and all of the averments of the First Count of this her Declaration as fully as though copied herein and for further cause of action avers:

That during the time here in question there was in full force and effect the following Statutes of Tennessee:

"47-1212. 'Express warranty' defined.—Any affir-

mation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty." *47-1212, Tennessee Code Annotated.*

"47-1215. Implied warranties of quality or fitness.— Subject to the provisions of this chapter and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:

(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not,) there is an implied warranty that the goods shall be fit for such purpose.

(2) Where the goods are bought by description from a seller who deals in goods of that description (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be of merchantable quality.

. . .

(5) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

(6) An express warranty or condition does not negative a warranty or condition implied under this chapter, unless inconsistent therewith." *47-1215, Tennessee Code Annotated.*

First Amended Declaration

[fol. 7] At all times mentioned herein, the defendant, through its duly authorized agents, servants and employees, acting within the course and scope of their employment, was manufacturing, packaging, labelling, distributing and selling MER/29 for use by physicians in caring for their patients, and said defendant was representing, in its advertising, that MER/29 was effective in the control of excess body cholesterol by inhibition of its biosynthesis.

The defendant expressly warranted that MER/29 was virtually non-toxic and remarkably free from adverse effects, even on prolonged clinical use, and the defendant impliedly warranted that MER/29 was fit and proper for the purpose of treating such persons as the plaintiff's husband, and was of merchantable quality. These warranties were relied upon by the doctors for plaintiff's husband and by her husband, to plaintiff's damages.

At all times mentioned here, MER/29 was not non-toxic and did frequently produce adverse effects in humans, resulting in serious bodily harm and illness, and MER/29 was not of merchantable quality and was not fit and proper for the treatment of persons such as the plaintiff's husband.

Plaintiff avers that defendant violated the foregoing Statutes and breached both its Express and its Implied Warranties, which violations were proximate causes of her husband's pain, suffering and permanent disability as aforesaid.

[fol. 8] Plaintiff sues for her physical and mental pain and anguish and suffering and for the loss of consortium of her husband for the remainder of their natural lives.

Wherefore plaintiff sues defendant for $250,000.00 compensatory damages and demands a Jury to try her cause.

WATKINS, McGUGIN & STEWART

BY /s/ Dan E. McGugin
Attorneys for Plaintiff

I certify that copy of the foregoing Declaration has been sent to Mr. John K. Maddin, Jr., of counsel for defendant this 5th day of August, 1965.

/s/ Dan E. McGugin

[fol. 1]

In The
CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE

FRANCES D. KROHN

VS.

RICHARDSON-MERRELL, INC.
The WM. S. MERRELL COMPANY
DIVISION

NO. 72167

SUPPLEMENT TO FIRST AMENDED DECLARATION

With leave of the Court plaintiff amends and supplements her First Amended Declaration by adding the following words and figures:

THIRD COUNT

Plaintiff adopts all of the averments of the First Count as fully as though copied herein and for further cause of action avers:

That defendant violated its common law implied warranty that the medicine MER/29 was fit for the purpose for which it was manufactured, advertised and sold, to wit, human consumption when in fact it was not, being dangerous and injurious to human health, and/or unfit for human consumption, to the injury of plaintiff's husband.

Wherefore, plaintiff sues defendant for $250,000.00 damages and demands a Jury to try her cause.

Supplement to First Amended Declaration

[fol. 2] FOURTH COUNT

Plaintiff adopts all of the averments of the First Count as fully as though copied herein and for further cause of action avers:

Plaintiff avers that the defendant was engaged in the business of manufacturing and selling the product MER/29 for use as a medicine by human beings; that defendant expected the said medicine to reach the user or consumer without substantial change in the condition in which it was sold; that the medicine MER/29 did reach plaintiff's husband and was consumed by him without change in the condition in which it was manufactured and sold; that the said medicine MER/29 as manufactured was defective and unreasonably dangerous to users and consumers; that the said medicine because of its unreasonable and inherently dangerous characteristics permanently injured and damaged plaintiff's husband as aforesaid, for which defendant is under a strict liability under and by virtue of the Doctrine of Strict Liability as applied by the law of Tennessee.

Wherefore, plaintiff sues defendant for $250,000.00 damages and demands a Jury to try her cause.

FIFTH COUNT

Plaintiff adopts all of the averments of the First Count as fully as though copied herein and for further cause of action avers:

That defendant was engaged in the business of manufacturing and selling the drug MER/29 and by
[fol. 3] advertising, labeling and otherwise made to the public a misrepresentation of a material fact concerning the character or quality of said drug

sold by it, to wit, that it was a proper drug for human consumption and that it was free or reasonably free from harmful side effects which was relied on by plaintiff's husband, this being false as the said drug was in fact dangerous and unfit for human consumption and caused serious and permanent adverse or side effects to plaintiff's husband's damage and the permanent impairment of her husband's health as aforesaid, on account of which the defendant is under a strict liability under and by virtue of the Doctrine of Strict Liability as applied by the law of Tennessee.

Wherefore, plaintiff sues defendant for $250,000.00 damages and demands a Jury to try her cause.

SIXTH COUNT

Plaintiff adopts all of the averments as fully as though copied herein and for further cause of action avers that:

That the drug MER/29 was researched, manufactured, bottled in sealed containers, advertised and sold by the defendant; that it was unopened and unchanged in any way when purchased and taken by plaintiff's husband as directed to plaintiff's husband's injury and damage as aforesaid; and that the same was in the control of defendant within the meaning of the doctrine of res ipsa loquitur as applied under the law of Tennessee.

Wherefore, plaintiff sues defendant for $250,000.00 damages and demands a Jury to try her cause.

WATKINS, McGUGIN & STEWART

BY /s/ Dan E. McGugin
Attorneys for Plaintiff

In The
CIRCUIT COURT OF DAVIDSON COUNTY,
TENNESSEE

FRANCES D. KROHN

VS.

RICHARDSON-MERRELL, INC.,
ETC.

NO. 72167

DEMURRER

[Filed September 24, 1965]

Comes now the defendant, through its attorneys, and demurs to the declaration heretofore filed in this cause upon the ground that there is no warrant in law for the maintenance of such action as the plaintiff seeks, because she could not maintain such a suit at common law and there is no statute in Tennessee permitting its maintenance.

WHEREFORE DEFENDANT PRAYS JUDGMENT UPON ITS DEMURRER.

GRACEY, BUCK, MADDIN & COWAN

BY: /s/ John K. Maddin, Jr.
Attorneys for Defendant

I certify that a copy of this Pleading has been forwarded to Counsel of Record in this cause. This the 23 day of Sept., 1965.

GRACEY, BUCK, MADDIN & COWAN

BY: /s/ J. K. Maddin, Jr.

ASSIGNMENTS OF ERROR

1. The Trial Court erred in sustaining the demurrer to the Declaration. Tr. p. 21.

2. The Trial Court erred in finding and ruling that there is no such cause of action in Tennessee *under these particular facts* and as result in dismissing Appellant's suit. Tr. p. 31.

[fol. 1]

In The
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IRENE OWEN,
Plaintiff,

V.

ILLINOIS BAKING CORPORATION,
an Illinois corporation,
Defendant.

CIVIL ACTION
NO. 4619

OPINION

After a trial by jury, a judgment of $30,000 was returned in favor of plaintiff's husband in companion case 4618, for injuries received in an automobile collision between cars driven by plaintiff's husband and an employee

of defendant. In the instant case, a judgment of $5,000 was returned in favor of plaintiff for loss of consortium as a result of the accident.

Defendant has moved the court to set aside the judgment in case 4619, and seeks a new trial in case 4618.

The basis on which the court is requested to set aside the judgment of $5,000 is that under the decided cases in Indiana, which was the situs of the accident, there is no right of a wife to recover damages for loss of consortium, although such right is recognized as to a husband Burk v. Anderson, 232 Ind. 77, 109 N.E. 2d 407 (1953). The opinion in that case expressed marked dissatisfaction with the rule, but felt that under the decided precedents, no other decision was possible.

[fol. 2] In the opinion of this court, following the reasoning of the United States Court of Appeals for the District of Columbia Circuit, modern concepts of the marital relationship do not allow such anachronistic practices to be perpetuated in the law. In the case of Hitaffer v. Argonne Co., 183 F. 2d 811, cert. den. 340 U.S. 852, 71 S. Ct. 80, 95 L. Ed. 624, the court held that a husband and wife have, in the marriage relation, equal rights which will receive equal protection of the law. In the subsequent case of Smither & Co. v. Coles, 242 F. 2d 220, cert. den. 354 U.S. 914, 77 S. Ct. 1299, 1 L. Ed. 2d 1129, the District of Columbia Circuit overruled the decision in the Hitaffer case inasmuch as it related to the scope of exclusive liability provisions in the District of Columbia Workmen's Compnesation Act. However, it recognized the holding in that case that a wife has a protected right to maintain an action for loss of consortium.

As pointed out by the Hitaffer court, the right existed at common law, and when female emancipation resulted in the passage of enabling legislation removing previous disabilities on a woman's right to act in her own behalf before the law, the last barrier to the maintenance of such a suit should have been removed. (Id. at 816.)

In Indiana, two theories have been advanced to support the existing rule. In Brown v. Kistleman, 177 Ind. 692, 98 N.E. 631 (1912), the court held that this interest of the wife was not a property right or derived from a contract of bargain and sale, and it lies in an area which the law will not enter except out of necessity. However, the right is characterized, it arises from the marital relation, and to say that it inheres in the husband but not the wife is to indulge in what the Hitaffer court termed "legal gymnastics." And to grant a husband the right to sue on this right while denying the wife access to the courts in the assertion of this same right is too clearly a violation of Fourteenth Amendment [fol. 3] equal protection guarantees to require citation of authority.

In Doden v. Del-Mar Garage, 205 Ind. 59, 185 N.E. 860, the court concluded that all actions for loss of consortium were in fact actions for loss of services, and stated that it was unaware of any case which had been maintained solely for loss of consortium. This rationale is effectively refuted by the more recent Indiana case of Burk v. Anderson, supra, which recognized explicitly that services are only one element of the right which the law designates as consortium, and stated that the husband has a right of action for loss of all the elements of consortium, and not merely services, as intimated by the court in Boden, supra.

Thus again, to say that the husband has a right of action for all the elements of his consortium, but the wife does not, runs afoul of Fourteenth Amendment guarantees.

Under the Erie doctrine, federal courts are bound to follow the substantive law of the states in diversity cases. However, when, as here, a federal question is presented, the court does not look to the law of the state, but to federal law as interpreted by the United States Supreme Court, Porter Royalty Pool Co. v. C.I.R., 165 F. 2d 933, (CCA 6, 1948), cert. den. 334 U.S. 833, 68 S. Ct. 1347, 92 L. Ed. 1760 (1948).

Thus, this court determines that the denial of the right to sue for loss of consortium, when applied to a wife but not a husband, is clearly a violation of the wife's right to equal protection of the laws under the Fourteenth Amendment to the Federal Constitution. To draw such a distinction between a husband and
[fol. 4] wife is a classification which is unreasonable and impermissible, and likewise a violation of the Fourteenth Amendment guarantees.

The motion to set aside the judgment in favor of Irene Owen in Civil Action 4619 is hereby denied. An order may be drawn accordingly.

Dated: February 7, 1966.

/s/ Noel P. Fox
District Judge

Office-Supreme Court, U.S.
FILED
MAR 7 1967
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 876

FRANCES D. KROHN,
Petitioner,

VS.

RICHARDSON-MERRELL, INC., THE WILLIAM S. MERRELL COMPANY DIVISION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

BRIEF FOR RESPONDENT IN OPPOSITION

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INDEX

Opinions Below 1

Jurisdiction 2

Statutes, Rules, and Regulations Involved 2

Propositions Presented 3

Statement 3

Summary of Argument 4

I. The constitutional issue raised in the Petition for Certiorari was not properly and timely raised in the State Court proceeding 4

II. The Supreme Court of Tennessee did not decide a Federal constitutional question and a decision on the constitutional issue was not necessary to the determination of the case by the Tennessee Court 4

III. The decision of the Supreme Court of Tennessee rests on adequate State or non-Federal grounds .. 4

IV. Even if it be determined that the constitutional issue was properly raised in the State Court proceeding, certiorari should not be granted nor jurisdiction taken because:

A. The function and purpose of the Equal Protection Clause of the 14th Amendment to the Constitution of the United States is to protect existing and vested rights and; where there is no such right in existence or vested in the complaining party, there is nothing for the Constitution to protect 5

B. It is not the function of this Court nor of the Constitution of the United States to create new rights in that the purpose and function of the United States Constitution is to guarantee and protect existing and vested rights 5

C. The Constitution of the United States and particularly the Equal Protection Clause of the 14th Amendment will strike down legislation or other State action which unlawfully discriminates and denies existing vested rights, but where there is no existing or vested right, there can be no unlawful discrimination or denial 5

D. No conflict exists between Federal and State Courts on the question of a wife's right to sue for the loss of her husband's consortium except to the extent that certain States do allow a wife such a cause of action while others do not 5

E. It is settled law in Tennessee that there is no cause of action in a wife for loss of consortium of her husband and no conflict exists in Tennessee between any courts, State or Federal, on this question 5

F. There is no United States Constitutional requirement of uniformity in causes of action in the different states 5

Argument 6

Conclusion 12

Affidavit of Service 12

Citations

CASES

Armstrong v. *Armstrong*, 350 U. S. 568, 100 L. Ed. 118, 76 S. Ct. 824 8

Beck v. *Washington*, 369 U. S. 541, 8 L. Ed. 2d 98, 82 S. Ct. 955 ..... 7, 11

Black v. *Cutter Laboratories*, 351 U. S. 292, 100 L. Ed. 118, 76 S. Ct. 824 8

Demorest v. *City Bank Farmers Trust Co.*, 321 U. S. 36, 88 L. Ed. 526, 64 S. Ct. 384 8

Gibbs v. *Zimmerman*, 290 U. S. 326, 78 L. Ed. 342, 54 S. Ct. 140 10

Herb v. *Pitcairn*, 324 U. S. 117, 89 L. Ed. 789, 65 S. Ct. 459 8

Krohn v. *Richardson-Merrell, Inc., The William S. Merrell Co. Div.*, 216 Tenn. ....., 406 S. W. 2d 166 ....4, 6, 9

Rush v. *Great American Ins. Co.*, 213 Tenn. 506, 376 S. W. 2d 454 ..... 8, 9

Whitehurst v. *Howell*, 20 Tenn. App. 314, 98 S. W. 2d 1071 7

MISCELLANEOUS

Rules of the Supreme Court of the State of Tennessee, Tennessee Code Annotated, Vol. 1, Rule 14 ..... 2, 7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 876

FRANCES D. KROHN,
Petitioner,

vs.

RICHARDSON-MERRELL, INC., THE WILLIAM S. MERRELL COMPANY DIVISION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions are as stated in Petition for Writ of Certiorari, Page 2.

JURISDICTION

Petitioner's statement under this heading contained on Page 2 of the Petition is correct with the exception of the following statement:

> "The federal question was raised and decided adversely to Petitioner in the State Court proceedings."

It is Respondent's contention that the Federal question was not properly and timely raised in the State Court proceedings and that there was no holding or decision by the Supreme Court of Tennessee on any Federal question.

RULES OF COURT INVOLVED

Rule 14 of the Rules of The Supreme Court of Tennessee as contained in Tennessee Code Annotated, Volume 1, pages 818-819 provides as follows:

> "Rule 14.
>
> *Assignment of Errors.*—The assignment of errors shall contain in the order herein stated:
>
> (2) *Errors specified, how.*—A statement of the errors of fact or law relied upon to reverse or modify the same, showing specifically wherein the action complained of is erroneous, and how it prejudiced the rights of the appellant, or plaintiff in error, and reference to the pages of the record where the ruling of the court on matters constituting errors of law appears; and in case it is an error of fact, to the pages of the record where the testimony is to be found relied upon to sustain the same."

PROPOSITIONS PRESENTED

I.

The Supreme Court of the United States should not take jurisdiction of a case in which the highest court of a state has held that the Federal constitutional issue has not been properly and timely raised in the State Court proceedings.

II.

The equal protection clause of the Fourteenth Amendment to the Constitution of the United States cannot nor should the Supreme Court of the United States create a common law cause of action.

STATEMENT

The Respondent contends that there are certain inaccuracies in the statement in the Petition for Certiorari which should be corrected. The Supreme Court of Tennessee held in this case that the Federal constitutional issue had not been properly and timely raised in the State Court proceedings. Therefore, the Tennessee Court did not have before it the contention that the common law rule violated the Equal Protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States as is set forth on Page 5 of the Petition for Certiorari filed herein. The Supreme Court of Tennessee made no holding on the constitutional question as is contained in Petitioner's statement at the top of Page 6 of the Petition. The opinion rendered by the Supreme Court of Tennessee following the Petition for Rehearing filed by the Petitioner in that Court made no holding on any Federal constitutional question. To the contrary, the Court held that it was content to abide by its original opinion.

The Supreme Court of Tennessee held in this case that under the common law a wife had no cause of action for loss of consortium and that, since this decisional law has not been changed by statute the law of Tennessee remains that there can be no recovery by a wife for loss of consortium by reason of injury to her husband. *Krohn* v. *Richardson-Merrell, Inc.*, 406 S. W. 2d at 167.

SUMMARY OF ARGUMENT

REASONS FOR NOT GRANTING THE WRIT OF CERTIORARI AND FOR THIS COURT NOT INVOKING ITS JURISDICTION.

I.

The constitutional issue raised in the Petition for Certiorari filed herein was not properly and timely raised in the State Court proceedings.

II.

The Supreme Court of Tennessee did not decide a Federal constitutional question and a decision on the constitutional issue was not necessary to the determination of the case by the Tennessee court.

III.

The decision of the Supreme Court of Tennessee rests on adequate State or non-Federal grounds.

IV.

Even if it be determined that the Federal or constitutional question was properly raised in the State Court proceedings, certiorari should not be granted nor jurisdiction taken because of the following:

A. The function and purpose of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States is to protect existing and vested rights and; where there is no such right in existence or vested in the complaining party, there is nothing for the Constitution to protect.

B. It is not the function of this Court or of the Constitution of the United States to create new rights in that the purpose and function of the United States Constitution is to guarantee and protect existing and vested rights.

C. The Constitution of the United States and particularly the Equal Protection Clause of the Fourteenth Amendment will strike down legislation or other State action which unlawfully discriminates and denies existing vested rights, but where there is no existing or vested right, there can be no unlawful discrimination or denial.

D. No conflict exists between Federal and State Courts on the question of a wife's right to sue for the loss of her husband's consortium except to the extent that certain States do allow a wife such a cause of action while others do not.

E. It is settled law in Tennessee that there is no cause of action in a wife for loss of consortium of her husband and no conflict exists in Tennessee between any courts, State or Federal, on this question.

F. There is no United States Constitutional requirement of uniformity in causes of action in the different states.

ARGUMENT

It is respectfully submitted that a reading of the opinions of the Supreme Court of Tennessee in this case shows that the Tennessee Court expressly held that the Petitioner herein did not properly and timely raise the Federal constitutional question or issue now asserted. The Court stated:

> "Argument is made that the equal protection clause of the Fourteenth Amendment to the Constitution of the United States requires this Court to allow the wife recovery for loss of consortium, since the same is allowed a husband. To fail to do so, it is said, is to discriminate on the basis of sex; and that such is not a proper or legal basis for discrimination. *In the first place, we do not find this question to be properly and timely made by the assignments of error in this case.* (Emphasis supplied) See *F. Whitehurst* v. *Howell,* (1936) 20 Tenn. App. 314, 98 S. W. 2d 1071; *Taylor* v. v. *Elgin,* (1918) 140 Tenn. 602, 205 S. W. 428." Appendix to Petition for Writ of Certiorari, P. 8(a) and 406 S. W. 2d at 168.

Respondent would further respectfully point to the opinion of the Court on the Petition to Rehear and call this Honorable Court's attention to the last sentence contained therein where the Supreme Court of Tennessee stated: "We are content to abide the Court's original opinion." Appendix to Petition of Certiorari, 10(a) and 406 S. W. 2d at 169.

It is clear that the Supreme Court of Tennessee held that the assignments of error did not properly raise the constitutional issue which is now asserted by the Petitioner herein. It is Respondent's contention that this Court cannot and should not grant a Petition for Writ of Certiorari when the highest court of a state has held that the Federal

question has not been properly raised in the State proceeding. The Supreme Court of the United States cannot entertain a question not properly raised in the State Court nor actually decided by that Court. In *Beck* v. *Washington*, 369 U. S. 541, 8 L. Ed. 2d 98, 82 S. Ct. 955, this Court stated:

> "The failure to inject the equal protection contention into the case was carried forward to the proceedings before the Washington Supreme Court when petitioner failed to comply with that court's rule prescribing the manner in which contentions are to be brought to its attention. Rule 43 of the Rules on Appeal Revised Code of Washington provides that '[n]o alleged error of the superior court will be considered by this court unless the same be definitely pointed out in the assignments of error in appellant's brief.' " 369 U. S. at 552.

The opinion by the Supreme Court of Tennessee in this case expressly holds that the constitutional question was not properly raised by the assignments of error. The Court cited the Tennessee case of *Whitehurst* v. *Howell*, 20 Tenn. App. 314, 98 S. W. 2d 1071 which held that matters not contained in the assignments of error are not entitled to consideration. Rule 14 of Rules of the Supreme Court of the State of Tennessee provides that the assignments of error must contain:

> "A statement of the errors of fact or law relied upon to reverse or modify the same, showing specifically wherein the action complained of is erroneous, and how it prejudiced the rights of the appellant, or plaintiff in error, . . ." Tennessee Code Annotated, Vol. 1, Page 819.

There is no doubt but that the language contained in the opinions of the Supreme Court of Tennessee regarding the Equal Protection Clause of the Fourteenth Amendment was mere dicta and discussion. This Court has previously held that mere discussion of Federal questions in the opin-

ion of a State Court is insuffcient to give the Supreme Court jurisdiction. *Black* v. *Cutter Laboratories*, 351 U. S. 292, 100 L. Ed. 118, 76 S. Ct. 824; *Armstrong* v. *Armstrong*, 350 U. S. 568, 100 L. Ed. 705, 76 S. Ct. 629; *Demorest* v. *City Bank Farmers Trust Co.*, 321 U. S. 36, 88 L. Ed. 526, 64 S. Ct. 384.

This Court has previously held that for it to review a State Court decision it must appear that: (1) the State Court actually decided a Federal question, and, (2) that the decision of the Federal question was necessary to the State Court's determination of the cause. Even if this Court should decide that the opinions rendered by the Supreme Court of Tennessee make it uncertain as to whether that Court did or did not pass upon a Federal constitutional question, this Court, to avoid the necessity of reaching constitutional issues, will construe the State Court's decision as not have passed upon the constitutional question. See *Armstrong* v. *Armstrong*, supra. Certainly, the constitutional question now asserted by Petitioner was not necessary to the determination of this case by the Tennessee Court. In substance, the Tennessee Court held the following: (1) at common law the wife had no right of action for loss of consortium; (2) Tennessee is a common law state, and; (3) so much of the common law as has not been abrogated or repealed by statute is in full force and effect. The Tennessee Court held this to be the law in *Rush* v. *Great American Ins. Co.*, 213 Tenn. 506, 376 S. W. 2d 454 which was decided only two years prior to the decision of this case. The Tennessee Court in the case at bar held that it was its intention to fully adhere to the doctrine of the *Rush* decision. Appendix, *Petition for Writ of Certiorari*, P. 6(a) and 406 S. W. 2d at 167. Certainly, the decision of the Supreme Court of Tennessee in this case rests on adequate State or non-Federal grounds. See *Black* v. *Cutter Laboratories*, supra, and *Herb* v. *Pitcairn*, 324 U. S. 117, 89 L. Ed. 789, 65 S. Ct. 459.

The Respondent respectfully insists that even if this Honorable Court should determine that the Federal constitutional question was properly and timely raised in the State Court proceeding and further; that the State Court actually decided a Federal question; that the decision of the Federal question was necessary to the State Court's determination of the case; and, that the decision of the Tennessee Court did not rest on adequate State grounds there is still no proper basis for this Court to invoke its jurisdiction in this case and review this case.

It is respectfully asserted that the function and purpose of the Equal Protection Clause of the Fourteenth Amendment is to protect existing and vested rights. The Tennessee Court has held that it is a common law state. That Court has held that at common law there was no right vested in a wife to sue for loss of consortium caused by injury to her husband. The Tennessee Court has refused to create such a right, but has held that such creation is for the legislature. *Rush* v. *Great American Ins. Co.*, supra and *Krohn* v. *Merrell-Richardson,* etc., supra. Therefore, in that there is no right or cause of action in existence in Tennessee, there is no right for the Federal constitution to protect. It is certainly not the function of this Court nor of the Constitution of the United States to create and give birth to rights which are non-existent. The Constitution of the United States and the Equal Protection Clause of the Fourteenth Amendment will "strike down" legislation which is hostile and which unlawfully discriminates and denies existing and vested rights. Where there are no existing or vested rights, there can be no unlawful discrimination or denial of such rights. There is thus nothing for the Equal Protection Clause to "strike down". There is no hostile legislation which is discriminating against the Complainant.

In regard to the subject matter of the law in question, it is submitted the only action this Court can take would be to strike down the law which allows a husband such a right of action on the ground that allowing this right to the husband discriminates against the wife. This question is not at issue here. The Petitioner is asking this Court to create a new right in a party and not to strike down legislation which is denying an existing right. The Constitution relates to existing institutions and does not cover rights, privileges and obligations not specified and not existing. The purpose of the Equal Protection Clause of the Fourteenth Amendment is to prevent any person or class from being singled out as a special subject of hostile or discriminatory legislation.

A right or cause of action may be vested, and, if so, is property in the same sense in which tangible things are property and is equally protected against arbitrary interference, and whether it springs from contract or from the principles of the common law, the legislature may not take it away. *Gibbs* v. *Zimmerman,* 290 U. S. 326, 78 L. Ed. 342, 54 S. Ct. 140. All that a litigant is guaranteed by the Fourteenth Amendment is a *preservation* of his substantial right to redress by some effective procedure. The State has complete control over the remedies which it offers to suitors in its courts, even to the point of making them applicable to rights or equities already in existence. *Gibbs* v. *Zimmerman,* supra.

The Petitioner contends that there is presently a conflict in the decisions of the State and Federal courts respecting the constitutional question which is presented in this Petition. The Respondent respectfully asserts that there is no such conflict. Certain State jurisdictions allow a wife such a cause of action while others do not. Only to this extent can it be said that there is a conflict between

decisions of different courts. There is no Federal common law. There is no showing in the Petition of any conflict between any courts whose decisional law could apply to or govern the decision in this case. In Tennessee the law is settled. The Supreme Court of Tennessee has held what the settled law is. No other State or Federal court within Tennessee has made a holding which is contrary to or, in conflict with the decision in this case as rendered by the Supreme Court of Tennessee. A decision of the Court of Common Pleas of Ohio, *Clem* v. *Brown*, (Ct. of Common Pleas) Ohio, 207 N. E. 2d 398, showing that Court's interpretation of Ohio law, and a decision of a District Court in Michigan, *Owen* v. *Illinois Banking Corp.*, (W. D. Mich. 1966) ..... F. Supp. ....., showing that Court's interpretation of State law do not show a conflict on a Federal question between State and Federal courts as is asserted by the Petitioner. These cases only show that two trial courts or two courts of original jurisdiction have held that the State law of the two State jurisdictions involved allows a wife to sue for loss of consortium. These decisions simply show that different courts have applied the law of separate states differently. These decisions have no application to this case which involves solely a question of Tennessee law on which no conflict exists. There is no Federal constitutional requirement of uniformity in causes of actions in the different states. It is clear that there are decisions in certain other jurisdictions which allow a wife to sue for loss of consortium. Tennessee has held that no such right existed at common law and that no such right can be created judicially. As was stated so succinctly by this Court in *Beck* v. *Washington*, supra:

> "We have said time and again that the Fourteenth Amendment does not 'assure uniformity of judicial decisions . . . or (immunity from judicial error . . .)'

Milwaukee Electric R. & Light Co. v. Wisconsin, 252 U. S. 100, 106, 64 L. Ed. 476, 480, 40 S. Ct. 306, 10 ALR 892 (1920). Were it otherwise, every alleged misapplication of state law would constitute a federal constitutional question." 369 U. S. at 554, 555.

CONCLUSION

For the reasons set out above and in view of the applicable decisions of this Court and of the Supreme Court of Tennessee, it is respectfully and earnestly contended that the Petition for Writ of Certiorari in this cause be denied and that this Court refuse to invoke its jurisdiction.

Respectfully submitted,

JOHN K. MADDIN, JR.
Attorney for Respondent

AFFIDAVIT OF SERVICE

I, John K. Maddin, Jr., counsel for the Respondent, being first duly sworn according to law, depose and say:

That this 6th day of March, 1967, a true and exact copy of the foregoing brief has been mailed to the Honorable Lowe Watkins and the Honorable Dan E. McGugin of Watkins, McGugin and Stewart, 603 Commerce Union Bank Building, Nashville, Tennessee, 37201, Counsel for the Petitioner, Frances D. Krohn, as shown by the affidavit on file with this court.

JOHN K. MADDIN, JR.